An International Instrument on Permitted Uses in Copyright Law

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Is There Need for an International Instrument?

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Permitted Uses in Copyright Law

Is There Need for an International Instrument?*

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Abstract: *As a follow-up project to the "Declaration on a Balanced Interpretation of the Three-Step Test" (2008), the Max Planck Institute for Innovation and Competition has coordinated an international group of world-renowned copyright experts to produce a legal instrument (possibly in the form of an international agreement) containing a nucleus of indispensable copyright-permitted uses that States should be obliged to implement in their legislations. With the purpose of counterbalancing the current international trend in copyright law, characterised by its "minimal protection approach", concrete provisions and extended explanatory notes are provided to foster a "minimal limitation approach".*

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Introduction

(1) International copyright law imposes a "solid" minimum standard of copyright protection, while requiring a very "thin" minimum standard of permitted uses.[1] As the Bern Convention evolved and subsequent international Treaties were adopted international law has been progressively developed and interpreted as a limit for States to grant permitted uses and define their scope. This is mostly related to how the three-step test has been understood over time. The test, originally a way for Berne Union countries to permit reproduction of copyright works (Article 9(2) BC), has increasingly been applied as a strict method of regulating the system of limitations and exceptions to copyright.

(2) This restrictive understanding of exceptions and limitations goes hand in hand with the raising of intellectual property protection standards. This is increasingly the case in the current international environment, where some economically strong countries have shifted the focus of their efforts from multilateral *fora* to bilateral and regional agreements allowed by Article 1 of the TRIPS Agreement. These countries tend to negotiate for the inclusion of more protectable subject matters, broader and more extensive coverage, increased harmonization to their standards, stronger enforcement mechanisms, and a weakening of flexibilities and differentiation of treatment.

(3) With the aim of tackling these challenges deriving from an unbalanced and inflexible copyright system, the Max Planck Institute for Innovation and Competition (the Institute) launched a Copyright Project in 2012. Based on an international collaboration involving

[1] Some openness toward minimum limitations to copyright may be found in the Marrakesh Treaty and perhaps in Article 10 of the Berne Convention (right to quote). As for the latter, in particular, there are discussions about whether there is a boundary line between the three-step test and more specific limitations of the Berne Convention. In the context of Article 10 WCT, Reinbothe and von Lewinsky, for example, point out that some guidance on the question of which special cases international legislators had in mind and which ones might qualify under Article 10 WCT is revealed in the explicit exceptions listed in the Berne Conventions. This position implies that the Berne limitations themselves are special cases in the sense of the three-step test and thus subject to all the conditions of the test. See Jörg Reinbothe, Silke von Lewinsky, THE WIPO TREATIES 1996, 2002.
An overview on this debate in provided by Senftleben, COPYRIGHT LIMITATIONS AND THE THREE-STEP TEST. AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW, 2004. Discussions on the Marrakesh Treaty are provided by Reto M. Hilty et al., *Position Paper of the Max Planck Institute for Innovation and Competition Concerning the Implementation of the WIPO Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled*, 46 IIC, 707 (2015); Köklü, *The Marrakesh Treaty – Time to End the Book Famine for Visually Impaired Persons Worldwide*, 45 IIC, 737 (2014).

world-renowned copyright experts,[2] this Project has resulted in a legal instrument, designed with the potential of becoming an international treaty. The emerging Instrument is based on broad international consensus concerning core users' prerogatives and freedoms leading towards a balanced copyrighted system.

(4) This Instrument is the outcome of a process whose previous step was the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" prepared in a cooperation between the Max Planck Institute for Innovation and Competition[3] and the School of Law at Queen Mary University of London.[4] The Declaration opposes the increasingly restrictive understanding of the three-step test and raises concerns about its impact on the law of copyright and related rights, offering a balanced and flexible interpretation of the test in copyright law. The emerging Instrument goes a step further: it is not limited to recommendations or guidelines but it provides a core of minimum permitted uses to be implemented by Contracting Parties in their national legislations. This obligation on the part of Contracting Parties is at the very heart of the emerging Instrument, which aims to place in the hands of States a tool for resisting the political pressure that notoriously exists in international negotiations, especially - where the recourse to bilateral and regional agreements seems to be as undesirable as unstoppable - in the arena of bilateral or regional agreements. In this environment the Instrument might initially strengthen weaker countries, allowing them to pursue their domestic interests in a more coordinated way.

(5) In Part I this article highlights the international legal framework from which the idea of producing an international Instrument derives. In Part II it describes the Project for an Instrument on Permitted Uses in Copyright Law, considering in particular the strategy and purposes behind the Instrument.

I. Background

1. Evolution (or involution) of the three-step test

[2] The first meeting was attended by Denis Borges Barbosa, Michael Carroll, Carlos Correa, Thomas Dreier, Séverine Dusollier, Christophe Geiger, Jonathan Griffiths, Henning Grosse Ruse-Khan, Reto M. Hilty, Kaya Köklü, Annette Kur, Lin Xiuqin, Rryszard Markiewicz, Sylvie Nérisson, Gul Okutan, Alexander Peukert, Jerome Reichman, Jan Rosén, Martin Senftleben and Raquel Xalabarder.

[3] The Institute's name at the time was the Max Planck Institute for Intellectual Property and Competition Law.

[4] See Christophe Geiger et al., "*Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*", 6 IIC, 39 (2008).

(6) Since its introduction, the scope of the three-step test has been progressively extended. Originally understood as a "counterweight to the formal recognition of a general right of reproduction",[5] it aimed at allowing countries of the Berne Union to introduce permitted reproduction of copyright works "in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".[6] However, the conception of the test and the language used for its transposition into various legal tools has changed progressively: under the TRIPS Agreement and the WIPO Treaties[7] it has been extended to the full range of copyright and related rights.[8] In addition, the test has been enshrined explicitly in national and regional legislation and restrictively interpreted by courts, where it has mostly assumed the function of barring, rather than permitting, the adoption of exceptions and limitations to copyright as well as restricting the scope of application of existing limitations.

(7) This evolution (or involution) is particularly related to a decision of the WTO dispute settlement panel of 15 June 2000.[9] The WTO panel concluded that Section 110(5)(B) of the US Copyright Act, which exonerates certain commercial establishments (such as bars or restaurants that use non-dramatic musical works) from copyright royalty payments, violated the test as incorporated in Article 13 of TRIPS. The panel followed a restrictive interpretation of the test under a rigid and mechanical sequentiality: each step was treated as an independent entity.

(8) The voluminous literature on the meaning of the test after the WTO panel decision need not be repeated here;[10] in the context of this article it is sufficient to point out that although the WTO Panel interpretation of the three-step test has influenced its later

[5] See, Geiger et al., *The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT. L. REV., 581 (2014).
[6] Article 9(2) Berne Convention.
[7] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) April 15 1994, Article 28.1 Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round, Vol. 31, 33 I.L.M. 81 (1994). Word Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997)
[8] See Article 13 TRIPS and Article 10 WCT.
[9] Panel report, 15th June 2000, WT/DS/160/R. For discussion see Jane C. Ginsburg, *Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions*, 187 RIDA, 3 (2001); Martin Senftleben, *Towards a Horizontal Standard for Limiting Intellectual Property Rights? WTO Panel Reports Shed Light on the Three-Step Test in Copyright Law and Related Tests in Patent and Trademark Law*, 37 IIC, 407 (2006); Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L. J., 733 (2001).
[10] For a detailed overview, see Senftleben, *Copyright, Limitations and the Three-Step Test*, *op. cit.*

understanding and application, this should not be considered a final ruling.[11] Instead, when assessing this decision it is worth considering that the legal framework within which the WTO panels operate is the law of international trade, not of copyright. Therefore, WTO panels are likely to be relatively insensitive to arguments based on fundamental rights and freedoms or other non-economic public interests (although Article 7 of the TRIPS Agreement mandates that the protection of intellectual property rights be "conducive to social and economic welfare, and to balance of rights and obligations"[12]).

(9) The restrictive interpretation of the test contrasts with both its literal wording and historical background. The first three-step test – Article 9(2) Berne Convention – was based on a draft proposal tabled by the UK delegation at the 1967 Stockholm Conference for the Revision of the Bern Convention.[13] It is based on language originally submitted in English, translated into the official French and subsequently retranslated into the English versions of the Convention. These linguistic stages might have modified the meaning the writers had intended to give the test.[14] Indeed, as the first draft was carried out by a delegation belonging to the Anglo-American copyright tradition, it is difficult to imagine that the drafters intended to establish a rule opposite to an open-ended factors test, comparable to traditional fair use legislation in common law countries. Quite the contrary, the broad formulation of the provision settled the question of exceptions and limitations in a way that countries of both the open-clause and the closed-list tradition could accept.

(10) Furthermore, the Agreed Statement concerning Article 10 WCT formally adopted by the 1996 WIPO Diplomatic Conference supports this analysis. The function of the Three-Step Test was described as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extent into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Bern Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are

[11] Geiger et al., The Three-Step Test Revisited, *op. cit.*

[12] P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*. Study supported by the Open Society Institute (OSI), March 6, 2008; Amsterdam Law School Research Paper No. 2012-43; Institute for Information Law Research Paper No. 2012-37 (March 7, 2012), http://ssrn.com/abstract=2017629.

[13] See Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967 (1971).

[14] About the historical background of the three-step test see Senftleben, *The International Three-Step Test: A Model Provision for EC Fair Use Legislation*", 1 JIPITEC, (2010); Id., COPYRIGHT LIMITATIONS AND THE THREE-STEP TEST. AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW, 2004.

appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Bern Convention". Thus, it appears to be clear that the Three-Step Test is intended not only as a control mechanism but also as a guideline for the extension of existing limitations and exceptions, and the introduction of new exemptions.

2. Drifts of the three-step test within the European copyright law

(11) European copyright law represents a clear example where the three-step test has become a strict method of regulating the system of exceptions and limitations to copyright. The Information Society Directive from 2001 (InfoSoc Directive)[15] establishes a series of broadly defined exclusive rights and subjects those rights to an exhaustive, but optional, list of permissible exceptions.[16] In addition to the stringent system of exceptions and limitations by which users are bound, the restrictive three-step test was introduced: according to Article 5(5) of the InfoSoc Directive, the exceptions and limitations set out in Article 5(1) to (4) "shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests the rightholder". This approach raises two points.

(12) Firstly, if national legislation adopts and specifies exceptions listed in the EU catalogue, these exceptions may still be challenged on the grounds that they are incompatible with the EU three-step test. Thus, for example, where a Member State introduced in its national law a broad exception for e-learning, such an exception may be incompliant with the mentioned Article 5(3)(a) of the InfoSoc Directive (use for the purpose of illustration for teaching or scientific research) interpreted according to the EU three-step test.

(13) Secondly, national exceptions that are embedded in a national framework may further be restrictively interpreted by invoking the EU three-step test; the test may be applied to place additional constraints on national exceptions that are defined narrowly anyway. As a matter of fact, although neither the international legal instruments in place, nor the InfoSoc Directive define the test as a principle obliging courts

[15] See, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[16] Reto M. Hilty & Kaya Köklü, *Limitations and Exceptions to Copyright in the Digital Age. Four Cornerstones for a Future-Proof Legal Framework in the EU*, in NEW DEVELOPMENTS IN EU AND INTERNATIONAL COPYRIGHT LAW, 283 (Irini A. Stamatoudi ed., 2016).

to interpret exceptions and limitations in a manner that favours rightholders,[17] European national judges have increasingly applied it in an unbalanced manner, perceiving it as an "economic prejudice" test.[18] This phenomenon has become progressively more widespread across national courts,[19] creating a system which offers little room for flexibilities, and is hardly adaptable to technological progress, since it has become very difficult to extend free uses by analogy beyond the perimeter specified by law. One of the most widely criticised examples of the adoption of a strict standard is provided by the decision of the French Supreme Court in the *Mulholland Drive* case.[20] In this case, the French Supreme Court held that the private copy exception under French copyright law is not a positive right of access for users of copyright works and must be construed in accordance with the three-step test under Article 9(2) of the Berne Convention. The Court stated that in the digital environment, the existence of an exception permitting the making of private copies of DVDs would prejudice the normal exploitation of the copyright work and would therefore violate the test's second step.[21] On similar basis, the District Court of The Hague restricted the exception for press review. The case dealt with the unauthorised scanning and reproduction of press articles for internal electronic communication in ministries. In determining whether this practice was permissible, the Court considered the provision in Article 15 of the Dutch Copyright Act to be non-compliant with the requirement of the EU three-step test.[22]

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[17] For a discussion see Griffiths, *The "Three-Step Test" in European Copyright Law – Problems and Solutions*, in Queen Mary School of Law Legal Studies Research Paper No. 31/2009 (Sept. 22, 2009), http://ssrn.com/abstract=1476968.

[18] In the Green Paper underlying the Information Society Directive, but not in the Directive, the European Commission had referred to the test as a guiding principle, highlighting the fact that "a number of parties suggest the 'general economic prejudice' clause in Article 9(2) Berne Convention as a point of reference". See, EU Commission, Document COM (96) 586 final, dated 20 November 1996, p.11–12.

[19] On the issue see Christophe Geiger and Franciska Schönherr, *The Information Society Directive (article 5 and 6 (4))*, in EU COPYRIGHT LAW: A COMMENTARY, 440 (Paul Torremans and Irini A. Stadamoudi eds., 2014).

[20] Cour de cassation (Cass.) (Supreme Court for Judicial Matter), February 28, 2006, (2006) 37 IIC, p. 760, Cours d'appell (CA) (Court of appeal) Paris, April 22, 2005, (2006) 37 IIC, p. 112. For a discussion see Geiger, *The Three-Step Test, a Threat to a Balanced Copyright Law?*, 37 IIC, 683 (2006). The development of the three-step test is considered in Griffiths, *The "Three-Step Test" in European Copyright Law – Problems and Solutions*, *op. cit*.

[21] On the French case see Griffiths, *ibid*.

[22] Rb. Den Haag, March 2, 2005, case no. 192880, LJN: AS 8778, Computerrecht 2005, p. 143 with case comment by Kamiel, J. Koelman. See Griffiths, The *"Three-Step Test" in European Copyright Law – Problems and Solutions*, *op. cit.*; Senftleben, *Fair Use in The Netherlands – A Renaissance?*, 33 AMI, 1 (2009). Dutch courts applied the three-step test already prior to the Information Society Directive. In the case *Zinderogen Kunst* dating back to the year 1990, the Dutch Supreme Court invoked the three-step test of Article 9(2) of the Berne Convention to support its holding. See HR 22 June 1990, case no. 13933, Nederlandse

(14) Decisions of national judges come together with the CJEU approach which has formally imposed a strict interpretation of limitations and exceptions according to the three-step test. In the *Infopaq* decision, the Court held that: "the exemption"[in Art 5(1) relating to transient copying] must be interpreted in the light of Article 5(5) of Directive 2001/29, under which that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder".[23]

(15) At the same time, however, the rigidity of this abstract statement clashes with the need to adapt the legal framework in a timely manner to individual cases and technological advances. This tension emerges in a number of CJEU decisions: on the one hand, the CJEU formally states a strict interpretation of limitations; on the other hand, it offers balanced solutions relying on a "purposive approach". With regard to the same exception examined in the earlier *Infopaq* decision – transient copying in the sense of Article 5(1) InfoSoc Directive – in *Football Association Premier League* the Court stated that: "[I]n accordance with its objective, that exception must allow and ensure the development and operation of new technologies and safeguard a fair balance between the rights and interests of rightholders, on the one hand, and of users of protected works to avail themselves of those new technologies, on the other hand".[24] The Court concluded that the transient copying at issue in *Football Association Premier League* performed within the memory of a satellite decoder and on a television screen, was compatible with the three-step test of Article 5(5) InfoSoc Directive.[25] Even in the *Painer*,[26] *Deckmyn*[27] and *Technische Universität Darmstandt*[28] decisions, the Court sought to enable the effectiveness of copyright limitations focusing on their objective.

(16) Sensitivity to a more balanced system of copyright exceptions and limitations was also shown by some national judges. Constricted by the closed system of limitations and exceptions, they have examined

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Jurisprudentie 1991, p. 268. So did also the Tribunal de Première Instance (Civ.)(Tribunal of First Instance) Brussels, 13 February 2007, [2007] ECDR 5.

[23] CJEU, July 16, 2009, Case C-5/08, *Infopaq International/danske Dagblades Forening*, available online at www.curia.eu, para. 56–57.

[24] CJEU, Oct. 4 2011, cases C-403/08 and C-429/08, *Football Association Premier League/QC Leisure*, available online at www.curia.eu, para. 164.

[25] Cf. Bernt P. Hugenholtz, Senftleben, *Fair Use in Europe: In Search of Flexibilities*, Amsterdam: Institute for Information Law/VU Centre for Law and Governance 2011, https://www.ivir.nl/publicaties/download/912.

[26] CJEU, Dec. 1, 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, available online at www.curia.eu.

[27] CJEU, Sept. 3, 2014 Case C-201/13, *Johan Deckmyn and others v. Helena Vandersteen and others*, available online at www.curia.eu.

[28] CJEU, Sept. 11, 2014, Case C-117/13, *Technische Universität Darmstadt/Eugen Ulmer KG,* available online at www.curia.eu.

other avenues in search of flexibility. In some cases national judges in Europe find normative inspiration in fundamental freedoms, such as the freedom of expression, artistic freedom and the right of privacy;[29] sometime they look for flexibilities in contract law, as in the German case where the Federal Supreme Court stated that Google thumbnail images do not infringe copyright law.[30] In other (rare) cases courts have resorted to the doctrine of misuse or abuse of copyright law in such a way as not to read the list of exceptions so rigidly.[31] Interestingly, national courts have occasionally drawn on an alternative approach to the three-step test.[32] The German Federal Supreme Court very clearly adopted such an approach[33] in a case involving the Technical Information Library of Hannover having an electronic catalogue and sending copies of articles from scientific periodicals to users upon request. A representative association for publishers and booksellers claimed that such activities infringed the reproduction and distribution right of the authors of the articles at issue. The legal basis of this practice was the statutory limitation for personal use in Sec. 53 of the German Copyright Act. The German Court admitted that the library's activity came close to that of publishers. However, instead of impeding the library's practice, the Court held that authors, in order to stay below the ceiling of the normal exploitation of the work that is part of the three-step test, had to be remunerated in return for the uses covered by the exception. A few years later the same Court followed a similar approach with respect to the three-step test, stating that the digital version of press reviews corresponds to traditional analogue products.[34] The wording of the German exception under discussion in the litigation (Sec. 49 German Copyright Act) seemed to refer only to press reviews on paper. Therefore, the scanning and storing of press articles for internal email communication of digital press reviews in a private company was apparently excluded by such exception. But the German Court

[29] See, for example, Bundesverfassungsgericht (BVerfG) (Federal Constitutional Court) June 29, 2000, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT (ZUM) 867, 2000 (Ger.).

[30] See, Bundesgerichthof (BGH) (Federal Court of Justice), April 29, 2010, NEUE JURISTISCHE WOCHENZEITSCSHRIFT (NJW) 2731, 2010 (Ger.).

[31] One of the most recent and well-reasoned decisions in the field is S.T.S., April 3, 2012 (R.X., No. 172) (Spain). See, Raquel Xalabarder, *Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?*. 3 JIPITEC, (2012). See also, Sganga, Caterina & Scalzini, Silvia, *From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law*, 2016, https://ssrn.com/abstract=2826240; Caron, Cristophe, *Abuse of Rights and Author's Rights'*, R.I.D.A. 2 (1998).

[32] Paul Torremans, *Archiving exceptions: where are we and where do we need to go?*, in COPYRIGHT AND CULTURAL HERITAGE PRESERVATION AND ACCESS TO WORKS IN A DIGITAL WORLD 111 (Estelle Derclaye ed. 2010).

[33] Bundesgerichtshof (BGH) (Federal Court of Justice) Feb. 25, 1999, Case I ZR 118/96, [2000] ECC 237.

[34] See Bundesgerichtshof (BGH) (Federal Court of Justice) July 11 2002, Case I ZR 255/00, Gewerblicher Rechtschutz und Urheberrecht 2002, p. 963.

stated that a digital press review exception may be interpreted broadly in view of new technological developments.[35] In the light of these developments, existing limitations and exceptions can be interpreted in a flexible and extensive way. This view does not contrast with the version of the three-step test in Article 5(5) of the InfoSoc Directive.

(17) Even though some attentive judges are more likely than others to apply balanced solutions in individual cases, this does not solve comprehensively the structural problem caused by the above-mentioned strict interpretation of the three-step test. [36] In view of this, some commentators have advanced proposals for reviewing the test in a more balanced form.[37] However, the practical difficulties of rewriting the test are evident: the international legislative process in this area is notoriously slow, intense and influenced by lobbying.[38] Furthermore, a legislative revision of the test may not even be desirable: a review process of detailed rules by means of international treaties on intellectual property law would be inadequate in the face of constant and rapid technological development.

3. "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law"

(18) Among the proposals to manage the role of the tree-step test, the "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law" has come into play. As explained by the Declaration's authors, its aim is "to restore the three-step test to its original role as a relatively flexible standard precluding clearly unreasonable encroachments upon an author's right without interfering unduly with the ability of legislators and courts to respond to the challenges presented by shifting commercial and technological context in a fair and balanced manner".[39] Accordingly, the three-step test should allow a comprehensive assessment of all circumstances, whereby exceptions and limitations should be interpreted in the light of their meaning and purposes, while also weighing all the interests involved.

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[35] A similar approach was taken by the Swiss Federal Court in *Prolitteris v. Aargauer Zeitung AG* 39 IIC, 990 (2008).

[36] See, for example, Geiger, *From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test,* 29 EIPR, 486 (2007); Koelman, *Fixing the Three-Step Test*, 28 EIPR, 407 (2006).

[37] See, among others, Koelman, *ibidem.*

[38] Complexities of the negotiations process are described in Antony Taubman, *Thematic review: Negotiating "trade-related aspects" of intellectual property rights*, in THE MAKING OF THE TRIPS AGREEMENT, 15 (Jayashree Watal & Antony Taubman eds., 2015).

[39] Geiger et al., *Towards a Balanced Interpretation of the Three-Step Test for Copyright Exception*, 4 EIPR, 489 (2008).

(19) The Declaration is based on historic evidence and economic theories suggesting that flexibility in copyright law is recommended from at least two perspectives: 1) flexibility in interpretation and application of permitted uses in copyright law; and 2) flexibility of States to shape copyright law to their own cultural, social and economic development needs.[40] The ideal behind the Declaration is to clarify and foster the range of flexibility already embedded in TRIPS and other treaties, in particular the Paris and Berne Conventions, demonstrating that international legislation does not need to be applied by all Member States in the same way. Quite the opposite, according to varying socio-economic conditions, differentiation is necessary. Copyright exceptions and limitations tailored to domestic needs provide the most important legal mechanism for the achievement of an appropriate, self-determined balance of interests at the national level.

(20) However, the effects of the Declaration have remained relatively limited so far. Solely showing the flexibility of international intellectual property law may not help national legislatures for more than one reason, including the fact that these arguments rarely penetrate the circles of policy makers and, secondly, the circumstance that adapting the potential flexibility of existing limitations and exceptions presupposes a level of legal and technical proficiency that may lack in certain countries. What more matter, however, are the following circumstances within the international framework.

4. From agreed minimum protection standards to "imposed" extensive protection standards

(21) The minimum standard of protection introduced by the TRIPS Agreement for intellectual property rights only served as a step in the pursuit of stronger intellectual property rights[41]. In fact, some nations almost immediately began negotiating for the inclusion of additional protectable subject matter, broader and more extensive coverage, increased harmonisation, and stronger enforcement mechanisms.[42] In this process, bilateral and regional forums, allowed by Article 1 of the TRIPS Agreement, have taken the place of multilateral negotiations.[43] The willingness of some countries to seek ways to push for an

[40] See Mario Cimoli et al. (eds.), INTELLECTUAL PROPERTY, LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT, 2014.

[41] See, Annette Kur, *From Minimum Standard to Maximum Rules*, in TRIPS PLUS 20, 133 (Hanns Ullrich et al. eds. 2016).

[42] See Bryan C. Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM, 215 (Lorand Bartels, Federico Ortino, eds., 2006) available at http://ssrn.com/abstract=947767.

[43] For a working definition of multilateral and regional agreements, see Sean M. Flynn et al., *The U.S proposal for an intellectual property chapter in the Trans-Pacific Partnership Agreement*, 28 AM. UNIV. INT. L. REV., 105 (2012).

extension of intellectual property protection beyond the TRIPS standard is seen in several Free Trade Agreements (FTAs).[44] The political failure of the Anti-Counterfeiting Trade Agreement (ACTA[45])[46] did not discourage the pursuit of further trade agreements. Those agreements include specific provisions relating to IP, the result of which is the enlargement of State commitment beyond the TRIPS rules, thus repealing the limits and flexibilities hitherto permitted by TRIPS. The scope of this "TRIPS-plus" provision even exceeds that of ACTA, and some provisions run contrary to the balance of interests.[47]

(22) To what extent "TRIPS-plus" provisions strengthen copyright protection is one issue; another that warrants attention is the strategy behind the "TRIPS-plus" approach and the consequences resulting therefrom. In this context, an individual country willing to implement certain limitations and exceptions might be hindered through pressure from other countries or groups of countries defending high standards of copyright protection. Such standards of protection are designed by willing countries without considering the intellectual property rationale that contrariwise has been taken into account within international agreements.[48] While there is no doubt that the TRIPS Agreement and the treaties concluded by the World Intellectual Property Organization (WIPO) have reached a relatively high level of intellectual property protection,[49] they are relatively balanced

[44] A number of recent initiatives for new multilateral IP regimes in free trade agreements can be listed such as, to name just a few, TPP, RCEP, TTIP. An overview of initiatives and policy Annette Kur, *From Minimum Standard to Maximum Rules*, in TRIPS PLUS 20, 133 (Ullrich et al. eds., 2016); Josef Drexl et al., EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE?, 2014.

[45] For the full text of the ACTA Agreement see: http://trade.ec.europa.eu/doclib/docs/2010/december/tradoc_147079.pdf.

[46] Duncan Matthews & Petra Zíkovská, *The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, 44 IIC, 626 (2013).

[47] See, Cynthia M. Ho, ACCESS TO MEDICINE IN THE GLOBAL ECONOMY: INTERNATIONAL AGREEMENTS ON PATENTS AND RELATED RIGHTS, 2011; Peter K., Yu, *ACTA and Its Complex Politics*, 3 WIPO JOURNAL, 1 (2011); Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ: INTELLECTUAL PROPERTY L. REV., 1 (2005).

[48] See Hilty, *Ways Out of the Trap of Article 1(1) TRIPS*, in TRIPS PLUS 20 – FROM TRADE RULES TO MARKET PRINCIPLES, 185 (Ullrich et al. eds., 2016). See also Carlos M. Correa, *Multilateral Agreements and Policy Opportunities*, in INTELLECTUAL PROPERTY, LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT, 418 (Cimoli et al. eds., 2014).

[49] See Giovanni Dosi and Joseph E. Stiglitz, *The Role of Intellectual Property Rights in the Development Process, with Some Lessons from Developed Countries: An Introduction*, in INTELLECTUAL PROPERTY, LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT 1 (Cimoli et al. eds., 2014); Jerome H. Reichman, *Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow?*, 46 HOUS. L. REV., 1115 (2009). On the affirmation of intellectual property standard in developing countries see also Alexander Peukert, *Intellectual Property:*

considering the diverse standpoints of all countries involved. They also convey basic principles of intellectual property law, giving a possible interpretative key to World Trade Organization (hereinafter WTO) members.[50] Intellectual property, including copyright law, is justified as a mechanism for fostering innovation. Inherent in this "functional" rationale for creating private rights to exclude is the idea that the essential goal is public interest. Toward this end, variations of limiting the scope of intellectual property rights as a matter of principle are permitted by TRIPS, leaving room for interpretation from which national legislatures and courts may benefit in view of the socio-economic conditions of their countries. Along this line, TRIPS also includes transitional arrangements according to which some countries could benefit by delaying the application of certain provisions.

(23) Again, the international treaties in place and the TRIPS Agreement in particular, although they might be questionable from some points of view, are still the result of a multilateral, transparent contracting process. On the contrary, bilateral or regional agreements are mostly the outcome of a so-called "country club approach", which pursues interests of only some parties in a non-transparent manner.[51] In fact, weaker countries are likely to accept conditions contained in bilateral or regional agreements,[52] which stipulate standards for protecting intellectual property that go against their own interests, in exchange for certain privileges, such as concessions relating to free trade in goods and market preferences.[53] Such trade-off mechanisms might produce the effect of raising the standards for protecting intellectual property at the expense of the real needs of each country.[54] The overall impact can be further aggravated by knock-on effects, since Articles 3 and 4 of TRIPS require equal treatment of all Members, or nationals of those Members, of the WTO. Whether and to what extent the freedom to impose "TRIPS-plus" standards on other countries according to Article 1(1) may be limited by counterbalancing provisions of existing international law and its interpretation, is a

The Global Spread of a Legal Concept, in, KRITIKA – ESSAYS ON INTELLECTUAL PROPERTY, 114 (Peter Drahos et al. eds., 2015).

[50] See Hilty, *Ways Out of the Trap of Article 1(1) TRIPS*, *op. cit*.

[51] Yu, *ACTA and Its Complex Politics*, 3 WIPO JOURNAL, 1 (2011); Gervais, *INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT:* STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA, TRIPS AND DEVELOPMENT, 2007.

[52] On the issue concerning the effect of bilateral agreements, see Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is bilateralism a Threat?*, in THE FUTURE OF INTERNATIONAL ECONOMIC LAW, 133 (William J. Davey and John Jackson eds., 2008).

[53] This concern is addressed in Henning Grosse Ruse-Khan et al., *Principles for IP Provisions in Bilateral and Regional Agreements*, 44IIC, 878 (2013).

[54] Antonietta Di Blasé, *IP Protection in Investment Agreements,* in, GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW, 194 (Giorgio Sacerdoti et al. eds., 2014).

question that will not be discussed here.[55] Similarly, this article will not discuss whether and how claims against "TRIPS-plus" standards may be raised especially by those countries that signed bilateral agreements embedding those standards. What is of interest, instead, is identifying an effective strategic way out of the situation described above, which is the aim of the Project for an Instrument on Permitted Uses in Copyright Law.

II. Instrument on Permitted Uses in Copyright Law

1. Premise

(24) The very name of the Instrument – "Permitted Uses in Copyright Law" – expresses the idea on which it is based. Its aim is not to define a list of limitations and exceptions restraining an all-encompassing exclusive right of the copyright holder, but to foster a balanced copyright system by shifting the attention to the users' prerogatives. Limitations and exceptions are generally understood as instruments helping correct copyright exclusivity. But designing limitations and exceptions principally as "adjustment tools is a second-best approach" disregarding the complex needs that are essential for copyright to serve socially beneficial goals, economic growth and development[56]. From the perspective of the working group, rightholder protection and permitted uses are both equally essential in ensuring that copyright can have positive effects on society and the information economy. This argument is also related to a sound understanding of copyright law. This is not the right place to deal with the issue of the legal nature and scope of the right attributed to the creator of a work,[57] but it suffices to recall the principles stated in Articles 7 and 8 of TRIPS. Those provisions make clear that IP rights are not unconfined rights and emphasize the obligation for Members to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development".

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[55] The technical issue concerning whether and when TRIPS flexibilities can prevail over TRIPS-plus obligations in FTAs is addressed by Henning Grosse Ruse-Khan, THE PROTECTION OF INTELLECTUAL PROPERTY IN INTERNATIONAL LAW, 2016.

[56] See, R. L. Okediji, REFRAMING INTERNATIONAL COPYRIGHT LIMITATIONS AND EXCEPTIONS AS DEVELOPMENT POLICY, in Id. (ed.), COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, 2017, 429.

[57] This is an old discussion which is also related to the very notion of "intellectual property" as a property owner's right, rather than an individual right whose extension is related to its own function. See, for example, Tullio Ascarelli, TEORIA DELLA CONCORRENZA E DEI BENI IMMATERIALI: ISTITUZIONI DI DIRITTO INDUSTRIALE, 1957. See also Pierre-Emmanuel Moyse, *La nature du droit d'auteur: droit deproprité ou monopole?*, 43 MCGILL L. JOURNAL, 50743 (1998).

(25) The choice of the wording "permitted uses", instead of "users' rights", is related to the fact that the term "users' rights" is not (yet[58]) to be generally accepted.[59] On the contrary, according to the traditional understanding, users' prerogatives with respect to use of works and other protected subject matter without rightholder authorisation are referred to as "exceptions and limitations" to copyright.[60] But the terms "exceptions and limitations" although broadly used and commonly accepted suggest a one-sided (too-narrow) perspective, which runs contrary to the idea behind the Project. The idea associated with an "exception to a rule", is similarly misleading as the one related to a "limitation to exclusivity".

2. Aims and approach of the Project

(26) Based on the idea that a cooperation amongst "willing countries" is necessary to make use of flexibilities existing in international copyright law, and inspired by the "country club approach", the Project on Permitted Uses in Copyright Law has developed an international Instrument (possibly in the form of an international agreement) containing concrete provisions and extended explanatory notes as a core of "minimum" permitted uses of copyright works. As is the case in defining minimum standards of protection, which are based on bi- or multilateral agreements, the "country club approach" could also define, by means of an international instrument, minimal standards of permitted uses as long as they are consistent with the three-step test. Thus, the primary goal of the Instrument is to allow States to support each other in carving out necessary spaces of freedom, strengthening their position in international negotiations so that they can pursue their own national interests, and foster social and economic development in a coordinated manner.

(27) Upon closer examination, this legal tool would not only benefit weaker countries: all countries could benefit from the introduction of minimal permitted uses, including, for example, European countries.[61]

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[58] Interesting the CJEU in the above-mentioned *Painer* and *Deckmyn* referred to quotations and parodies as user "rights".

[59] About the use of the term "user's right" in different countries see Hilty & Sylvie Nerisson (eds.), BALANCING COPYRIGHT – A SURVEY OF NATIONAL APPROACHES, 1 (Id. eds., 2012).

[60] A discussion concerning the use of the term "users'right" was held by Lucie Guibault, *Copyright Limitations and Contracts. An Analysis of the Contractual Overridability of Limitations on Copyright*, 2002, especially p. 90. See also Lyman Ray Patterson & Stanley W. Lindberg, THE NATURE OF COPYRIGHT: A LAW OF USER'S RIGHT, 1991.

[61] See, for example, Cimoli et al. (eds.), INTELLECTUAL PROPERTY, LEGAL AND ECONOMIC CHALLENGES FOR DEVELOPMENT, *op. cit*., especially p. 511; Carsten Fink & Keith E. Maskus, *Why We Study Intellectual Property Rights and What We Have Learned*, in INTELLECTUAL PROPERTY AND DEVELOPMENT, LESSONS FROM

As mentioned before, those countries deal with the tight provisions of secondary EU law, which is often an obstacle to the adaptation of national copyright law to fast-paced technological developments. It is no secret that European (and generally Western) policy mostly considers the interests of the copyright industry as a priority. For this reason the path towards creating a system of permitted uses is still a challenge.

(28) Furthermore, by ensuring a minimum sphere of freedom to users, the Instrument might foster a certain uniformity of the different national legislations. Indeed, differences in the availability and scope of permitted uses in an increasingly interconnected world may undermine the attainment of the primary objectives of copyright protection and thus hinder the development of the information market[62].

(29) To achieve these aims, the working group envisages the international Instrument as an international agreement binding for Contracting Parties. In using the flexibility allowed by international treaties with respect to the protection of copyright and related rights, Contracting Parties may adopt obligations aimed at achieving a minimum level of permitted uses in their national copyright laws.

(30) The group of experts had previously explored the idea of creating a model law instead of a treaty. However, this solution appeared to be inappropriate and in any case less efficient than an international agreement: it would be difficult to establish a model law with worldwide applicability in the light of the various existing national copyright systems. Besides, even if a treaty approach were to fail in the end, a good draft might still help many countries to shape their domestic copyright laws according to their own needs.

3. Effectiveness as a key principle of implementation for achieving the Instrument's purposes

(31) Effectiveness is a general principle of implementation of the Instrument, which is crucial for achieving its aims. Essentially, this principle is based on the idea that States have to comply with their international treaty obligations (*pacta sunt servanda*), and that in order to do so, they need to implement the provisions to which they have agreed. The permitted uses codified in this Instrument should therefore not be negotiated away in trade negotiations or other *fora*.

RECENT ECONOMIC RESEARCH (Id. eds., 2005); Gene M. Grossman & Edwin L.–C. Lai, *International Protection of Intellectual Property*, 5 AM. ECON. REV., 1635 (2004).

[62] See, P. Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, cit.

Doing so would involve a breach of the duty to give effect to the provisions of this Instrument.[63]

(32) As long as the minimum permitted uses provided in the Instrument are made effectively available to users, Contracting Parties enjoy room for manoeuvre in establishing further permitted uses according to their domestic needs. Existing exceptions and limitations remain intact, to the extent that they do not prevent the implementation of the Instrument provisions. In fact, it may not under any circumstances be interpreted as a ceiling of protection of permitted uses.

(33) The Instrument needs to be implemented in relation to the objectives pursued by the provisions on permitted uses. In particular, where a permitted use has its grounds in the fundamental rights of individuals (such as freedom of expression), taking effective steps toward the pursuit of such rights is what this principle calls for. This understanding of effectiveness aligns with the general idea that the permitted use provisions in the Instrument need to be interpreted in light of their object and purpose, which is also expressed in the section of the Instrument dedicated to the three-step test.[64]

(34) At the same time, Contracting Parties are free to define the method of implementation of the Instrument. Since it does not establish a global, uniform copyright regime, its provisions need to be transposed into national law. In this process of implementation, each State is best placed to judge how the provisions on permitted uses can be given effect in a way that lives up to the principles of *pacta sunt servanda* and good faith. Thus, lawmakers may be compliant with the Instrument by both making a list of statutory permitted uses and creating open-ended clauses, such as fair use and fair dealing legislation. The legislature may consider the legal tradition of each State including the capabilities of courts to deal with open clauses[65] as well as cultural differences. For example, the fair use doctrine in US law, which is based on a fact-based and precedent-driven judicial

[63] This explanation is included in the Explanatory Notes which form part of the Instrument. Section 2 of Part B of the Instrument concerning Effectiveness is authored by Henning Grosse Ruse-Kahn.

[64] This is conform to the general and customary rules of treaty interpretation in international law, as codified in the Vienna Convention on the Law of Treaties (VCLT).

[65] The desirability of a system that attributes more deciding power to the courts is not taken into account here. However, this is a subject that certainly deserves special attention in future works, also considering the tendency of the civil law legal system to approximate to the common law tradition. A discussion about this issue is provided, for example, by Craig Nard with particular regard to patent law. See Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B. UN. L. REV., 51 (2010). Id., *Rethinking International Intellectual Property Law: What Institutional Environment for the Development and Enforcement of IP Law?*, Study Date period 27 November 2015 by ICTSD, CEIPI http://www.ceipi.edu/index.php?id=14535&L=2.

enquiry mandated by Sec. 107 US Copyright Act, might sit uneasily with some European judicial traditions.[66] Imposing a common-law approach by inserting an open clause would go beyond the bottom-line approach of the Instrument.[67]

(35) Furthermore, the Instrument provides other rules that complement the effectiveness principle to be followed when determining permitted uses at national level. For example, with regard to technological protection measures Part B, Section 3, of the Instrument reads: "Contracting Parties shall take appropriate measures to ensure that legal protection and effective legal remedies against the circumvention of effective technological measures do not prevent beneficiary persons from enjoying the permitted uses provided for in this Instrument". This provision is modelled on already existing international law, such as Article 7 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013) and the Agreed Statement concerning Article 15 of the Beijing Treaty on Audiovisual Performances (2012). It is understood that when the Contracting Parties choose to provide legal protection against the circumvention of technological measures, this legal protection should duly and adequately accommodate the permitted uses provided in the envisaged treaty. It remains a matter of national laws to determine the types of measures, including exemptions from the legal protection of technological measures, that could be put in place to ensure that beneficiary persons still enjoy the benefit of permitted uses provided for in this Instrument.

(36) Similarly individual States can be asked whether a permitted use can legitimately cover commercial and non-commercial use alike. It is a matter for the national legislation of the Contracting Parties to find an appropriate solution in the light of the general provision that the use is only permitted to the extent justified by the purpose. In this context, to be compliant with the three-step test, embedded in the Instrument under Part B(II), it may be decisive whether national law provides for the payment of an equitable remuneration. Each individual State could decide to allow certain uses that in some measure interfere with the normal exploitation of the work, while also envisaging a right to

[66] Arguments supporting the possibility of introducing an open clause in European - civil law - legal systems are delivered in Senftleben, *The Perfect Match – Civil Law Judges and Open-Ended Fair Use Provisions*, 32 AM. U. INT'L L. REV. (forthcoming, Aug., 2017).

[67] It is interesting to note that in the "Wittem Group's European Copyright Code" an open-ended clause was introduced in Chapter 5, "Limitations". In particular, Chapter 5 reflects a combination of a common-law-style open-ended system of limitations and a civil-law-style exhaustive enumeration. For further discussion on this see, for example, Ginsburg, *European Copyright Code – Back to First Principles (with Some Additional Detail)*, January 2011, Auteurs et Medias (Belgium), 2011, Columbia Public Law Research Paper No. 11-261, http://ssrn.com/abstract=1747148.

equitable remuneration for copyright holders. Or one might even imagine different systems of equitable remuneration and compensation for the original rightholder (the creator) and the derivative rightholder (for example, a publisher or producer).[68] In any case, the Instrument does not impose any form of equitable remuneration or compensation but simply suggests it as a tool for ensuring compliance with the three-step test.

(37) The flexibility embedded in the Instrument is consistent with the provisions of current international treaties. In particular, the Instrument recognises that Contracting Parties have obligations to each other under treaties concerning copyright, and that nothing in the Instrument itself derogates from any such obligations or prejudices any rights that a Contracting Party has under any such treaties, except where the exercise of those rights would cause a serious conflict with or threat to the objectives of this Instrument.

4. Structure of the Instrument

(38) The Instrument contains three Parts: a) Permitted Uses, b) General Principles of Implementation, and c) Competition / Abuse. The text does not provide for specific remedies. It also does not specifically address neighbouring rights, although it explicitly mentions them stating that permitted uses provided for by the Instrument apply *mutatis mutandis* to related rights to the extent justified by the purpose of the use.

(39) More precisely, the first part, which specifically defines the permitted uses, categorises free uses in five groups focusing on certain values: 1) Freedom of expression and information; 2) Social, political and cultural objectives; 3) Use of software; 4) Uses with minimal significance; and 5) Exhaustion / Free circulation. The permitted uses are modelled on international provisions, such as Article 10(2) of the Berne Convention and the provisions for the benefit of visually impaired and print-disabled persons in the Marrakesh Treaty, as well as national experiences in this area. In the light of the three-step test of Article 10 WCT, the provision updates and extends relevant limitations to present needs, in particular against the background of the digital environment.

[68] A sketch of how a "double-track" approach could look like is drafted in Reto M. Hilty & Valentina Moscon, PART F – CLAIMS TO FAIR COMPENSATION, in Id. MODERNISATION OF THE EU COPYRIGHT RULES. Position Statement of the Max Planck Institute for Innovation and Competition, (September 18, 2017); Max Planck Institute for Innovation & Competition Research Paper No. 17-12. Available at SSRN: https://ssrn.com/abstract=3036787, pp. 89-97.

(40) The second part of the Instrument defines the above-mentioned implementation principles aimed at guiding States in the specific definition of permitted uses. The Instrument provides guidelines that are consistent with the interpretation of the three-step test as defined in the mentioned Declaration

5. Status of the Project and ways forward

(41) The copyright experts involved in the Project met for the first time in 2012 to agree on the approach and objectives of the Instrument as well as to define preconditions and the main content of the envisioned treaty. The proposals were collected by the Institute, which also made sure to exchange information with and gather consensus from all participants on every aspect of the Instrument. A subsequent meeting at the Institute helped to integrate and improve the Instrument in different points. At the time of the editorial deadline of this book a document is presented that is substantially agreed upon in all its parts. The working groups, which were established according to the scientific expertise of the participants in the Project, are drafting explanatory notes that will form an integral part of the Instrument itself. The notes should enable readers to understand the purpose of the Instrument and the rationale of the individual provisions.

(42) The destiny of the Instrument is open. It would be desirable for it to find its own way into the political discussion after an initial phase of scientific debate. Although the possibilities of academic science to enter the political sphere are relatively limited, a first phase of discussion on the Instrument might see interest from a number of States. There is a risk that the development of the Instrument as an international treaty might fail due to obstructionism by countries that (still) feel bound to the influences of the copyright industry only. In any case, whether or not the Instrument succeeds in influencing international and national legislation, it offers an opportunity to consider the nature of the rights that copyright secures, the purposes that a copyright system should serve and the need to grant permitted uses to reach those purposes in compliance with a coherent interpretation of the three-step test.

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